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Open-ended Working Group taking forward multilateral nuclear disarmament negotiations[1]

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Item 5 (a) of the agenda
Taking forward multilateral nuclear disarmament negotiations: concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons

Developing and strengthening norms for attaining and maintaining a world without nuclear weapons

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I. Introduction

1. The mandate of the open-ended working group specifically mentions norms among items that "would need to be concluded to attain and maintain a world without nuclear weapons". This is an important inclusion, as norms are often neglected in discussions of how best to take forward nuclear disarmament, which tend to focus on the development and implementation of legal measures, and on compliance with those measures.

2. This working paper examines ways in which norms for attaining and maintaining a world without nuclear weapons might be developed and strengthened, as well as the role they might play in conjunction with legal and other measures. It draws on experience with disarmament and arms control regimes applying to other types of weapons, and also considers the particular role that norms might play in strengthening the capacity of non nuclead-armed State to contribute effectively to taking forward multilateral nuclear disarmament negotiations.

II. Norms and their effect

3. In the context of international relations, norms have been defined as "collective expectations for the proper behavior of actors within a given identity"[2]. Norms are therefore distinct from the explicit obligations codified in international treaties, but they may emerge

[1] Established pursuant to resolution 70/33 of the General Assembly of the United Nations.
[2] Katzenstein, P. J., ed. (1996) The Culture of National Security. New York: Columbia University Press

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from the establishment and implementation of such treaties. In a cycle of evolving mutual reinforcement, laws influence behaviour and expectations, which over time may be codified into new laws, which in turn influence behaviour and expectations. So norms may both emerge from existing treaties and lead to the creation of new ones.

4. An important feature of norms is that, in contrast to treaties, they do not require that a State explicitly adhere to them in order to have an effect. Neither do norms require universal support in order to be established. Indeed, norms can and do affect the behaviour of a State even in cases where the State explicitly rejects the norm, or denies its existence or applicability.

5. Norms, even longstanding and universally-accepted ones, are often violated. There may be no direct remedy for such violations, beyond general disapproval and criticism from other States, although grave cases might result in mobilization of the international community to take action through UN or other formal multilateral channels. Counterintuitively, however, violation of a norm often adds to its strength. For example, the very act of a State explaining why a certain course of action is not contrary to a given norm, or is some kind of justified exception, only reinforces the legitimacy of the norm itself.

6. Since norms are a kind of collective expectation, they may be more democratic and inclusive as a means of regulating international behaviour than formal treaties are. While some States continue to have greater influence than other in negotiating treaties and steering their implementation, there is much less difference among States in terms of their relative contribution to the development of norms. By definition, all States contribute to shaping collective expectation. Developing and strengthening international norms is a means by which countries can overcome some of the disadvantages they face in determining the nature and direction of international relations, particularly in the area of disarmament.

III. Examples of norms in disarmament and arms control

7. Following are some examples of existing norms in disarmament and arms control, that have largely emerged from treaties and their evolving implementation over time. It is important to note that in each case, the norm now extends well beyond the scope and membership of the underlying treaty.

Anti-personnel landmines

8. The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction established a comprehensive prohibition on anti-personnel landmines (APL), but many large producers and users of APL did not participate in its negotiation and did not join the treaty. Nevertheless, the strong humanitarian framing of the treaty, its undeniable success in dealing with the humanitarian catastrophe caused by APL, its significant contribution to international development, and its vocal support from a wide range of international organizations and civil society, led to the emergence of a powerful norm against APL. Even among States that have not joined the treaty, use of APL has dropped significantly, and international trade in APL has all but ceased. Countries that continue to use APL feel obliged to make excuses and rationalizations, largely accept the stigmatization of the weapon, and typically signal an intention to eventually cease using it.

Biological weapons

9. The 1972 Biological Weapons Convention (BWC) is a short treaty that completely prohibits the development, acquisition, possession and transfer of biological weapons. Over the course of its history, the BWC has often been criticized for its lack of a verification mechanism or an international organization to manage its implementation. There were a number of incidents of suspected violation of the treaty during the 1970s and 1980s (some subsequently confirmed), and doubts remain about compliance in some quarters. But despite these problems, and its lack of universal membership, the BWC has resulted in the emergence of an unquestioned global norm against biological weapons, to the extent that today no government would ever publicly suggest that biological weapons could be a legitimate means of national defence. This is a stark contrast to the situation in the 1950s and 1960s, when biological weapons were unapologetically held by a number of States as part of their strategic arsenals.

Nuclear weapons

10. Norms against nuclear weapons also exist, but are weaker and less comprehensive. There is undoubtedly a norm – sometimes called a taboo – against the use of nuclear weapons in warfare, although this is somewhat undermined by deterrence theory. The Treaty on the Non-Proliferation of Nuclear Weapon (NPT) has established a norm against the acquisition of nuclear weapons by those that do not already have them, and perhaps more significantly has created a collective global expectation that nuclear weapons will one day be eliminated. This expectation is shared by those nuclear-armed States outside the NPT. It is important to note that these NPT related norms were created without the involvement of all, or even a majority of, the nuclear-armed States (China and France did not join the NPT until 1992; South Africa joined in 1991; India, Israel and Pakistan have never joined).

IV. Developing and strengthening norms against nuclear weapons

11. Given the characteristics of norms, and drawing on the existing successful examples in the field of disarmament and arms control, it is possible to devise a strategy to develop and strengthen norms for attaining and maintaining a world without nuclear weapons.

12. The first step is to shift the discourse on nuclear weapons from strategic, security and military considerations to humanitarian and moral/ethical ones. Such a shift was a key feature in the development of the norms against biological weapons and anti-personnel landmines (the preamble of the BWC, for example, States that the use of biological weapons would be "repugnant to the conscience of mankind"). This step has largely been taken with the humanitarian consequences initiative, including the three international conferences in 2013 and 2014, joint statements at the NPT and the General Assembly of the United Nations, the Humanitarian Pledge, and the related resolutions[3] of the General Assembly of the United Nations. This process could be continued, perhaps with a greater focus on the risks posed by nuclear weapons, working to gradually expand the number of States adhering to joint statements and voting in favour of resolutions. But this process is not likely to be sufficient in itself to build a strong and effective norm.

[3] 70/47 and 70/50.

13. A common factor in the development of the norms against anti-personnel landmines and biological weapons, but which is missing from the NPT, is the notion of *absolute* prohibition. While both the AP Mine Ban Convention and the BWC do not enjoy universal membership, the prohibitions in these treaties are comprehensive and absolute: the weapon is outlawed and unacceptable for all States parties under all circumstances. This would appear to be an important element in stigmatizing the weapon and extending the norm beyond the membership of the treaty. The provisions in the NPT that effectively allow five States to retain nuclear weapons for an unspecified time have hampered the development of a stronger norm against possession of nuclear weapons, and have inhibited stigmatization of them (it should be noted here that the NPT nuclear-weapon States actively resist moves to stigmatize nuclear weapons, despite sharing the collective expectation that nuclear weapons will eventually be eliminated, and having made an "unequivocal undertaking" to eliminate their own arsenals).

14. One means of bringing the notion of absolute prohibition into norms applying to nuclear weapons is to create a new treaty that prohibits nuclear weapons in the same absolute terms in which the BWC prohibits biological weapons and the Anti-Personnel Mine Ban Convention prohibits anti-personnel landmines. A treaty of this kind has been proposed by several States and by civil society organizations such as the International Campaign to Abolish Nuclear Weapons (ICAN), which have noted that such a treaty would not need to contain verification provisions or to include all – or even any – of the nuclear-armed States. Certainly, the experience with biological weapons and anti-personnel landmines suggests that even a treaty with limited membership and little content beyond a straightforward prohibition could be highly effective in developing and strengthening norms against nuclear weapons. The fact that some nuclear-armed States explicitly oppose such a treaty is further evidence of its likely effectiveness as a means of norm-building.

15. A joint approach of continuing to focus on the humanitarian and moral/ethical aspects of nuclear weapons, coupled with development of a legally-binding absolute prohibition on nuclear weapons (even of limited membership), would offer a high likelihood of building an effective norm over time. It would also provide a practical and realistic means by which developing countries could start to redress some of the imbalances in current multilateral approaches to nuclear disarmament and international security, where the interests of powerful nuclear-armed States and their allies are given disproportionate weight. Since all interested countries can participate on equal terms in developing norms against nuclear weapons, this approach would be fair, inclusive and transparent.